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7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE DISTRICT OF ARIZONA**

9  
10 **PAMELA C. SULLIVAN,**

11 Plaintiff,

12 v.  
13

14 **BANK OF AMERICA,**  
15 **NATIONAL ASSOCIATION,**

16 Defendant.  
17

**Case # 4:13-CV-01166-JGZ (BGM)**

**PLAINTIFF'S PRE-  
CONFERENCE MEMORANDUM**

(Discovery dispute telephonic  
conference before  
Hon. Bruce G. Macdonald)

18 Plaintiff Pamela C. Sullivan, by Jerry S. Smith, PLLC, her undersigned  
19 attorney of record, submits this Pre-Conference Memorandum regarding the  
20 parties' present discovery dispute. The Plaintiff is seeking answers to certain  
21 interrogatories and responses to certain requests for production, and the  
22 Defendant will not provide them. The parties have been unable to resolve  
23 this discovery dispute after multiple communications among their counsel.  
24  
25  
26

1 The discovery sought by the Plaintiff herein is set forth in three prior  
2 discovery requests served upon the Defendant, and listed herein in three  
3 separate sections, infra:

4 **Plaintiff's Second Set of Interrogatories (#16 through 23) (April 3, 2015)**

5 **Plaintiff's Second Request for Production (April 3, 2015)**

6 **Plaintiff's Third Request for Production (April 30, 2015)**

7 For convenience and clarity, the discovery sought is set forth in black  
8 font, and the Plaintiff's positions are set forth in red font.

9 The Court, Hon. Bruce G. Macdonald, has set an informal telephonic  
10 conference for this discovery dispute for Wednesday, June 24, 2015, at  
11 11:30am. Dkt. #61.

### 12 **The Nature of this Action**

13  
14 As stated in the Complaint, Plaintiff Pamela C. Sullivan ("PCS") was  
15 employed by Defendant Bank of America ("BOA") for eighteen years, until  
16 she was fired eight days after her 40<sup>th</sup> birthday. Dkt. #1, Complaint,  
17 paragraphs 1, 4, and Exhibit #1. PCS was twenty-one years old when she  
18 was first hired as a teller on October 19, 1992, and had earned her tenth  
19 promotion in 2007 when she was promoted to BOA Senior Vice President &  
20 Consumer Marketing Executive ("CME") for the BOA Southwest Arizona, the  
21 highest level position in the Tucson market. She was responsible for the  
22 success of more than 25+ banking centers assigned to her market. Id. at  
23 paragraph 7. Her Complaint is a single claim for violation of the Age  
24 Discrimination in Employment Act, 29 U.S.C. 623(a)1. Dkt. #1.

### **Applicable General Rules**

In *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 350-351, 98 S. Ct. 2380, 2389, 57 L. Ed. 2d 253 (1978), the Supreme Court said:

“The general scope of discovery is defined by Fed.Rule Civ.Proc. 26(b)(1) as follows:

“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.”

The key phrase in this definition—“relevant to the subject matter involved in the pending action”—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. See *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 388, 91 L.Ed. 451 (1947).<sup>FN12</sup> Consistently with the notice-pleading system established by the Rules, discovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues. *Id.*, at 500–501, 67 S.Ct. at 388. Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.

FN12. “[T]he court should and ordinarily does interpret ‘relevant’ very broadly to mean matter that is relevant to anything that is or may become an issue in the litigation.” 4 J. Moore, *Federal Practice* ¶ 26.56 [1], p. 26–131 n. 34 (2d ed. 1976).”

1 In *Zahorik v. Cornell University*, 98 F.R.D. 27, 31 (N.D.N.Y., 1983), the  
2 Court said:

3 “Suffice it to say, that evidence of general patterns of discriminatory  
4 treatment by an employer is relevant even in the individual disparate  
5 treatment case. *Lieberman v. Gant*, 630 F.2d 60, 68 (2d Cir.1980); see  
6 also *McDonnell Douglas*, 411 U.S. at 804–05, 93 S.Ct. at 1825. Although  
7 such evidence will not be determinative of the discrimination issue, *id.* at  
8 805 n. 19, 93 S.Ct. at 1826 n. 19, it is nevertheless relevant and therefore  
9 discoverable pursuant to Fed.R.Civ.P. 26(b)(1).”

10 A party resisting or objecting to discovery has the burden of proving that  
11 the discovery sought is unduly burdensome or expensive under Federal  
12 Rules of Civil Procedure, Rule 26(b)(2)(C). *Blankenship v. Hearst*  
13 *Corporation*, 519 F. 2d 418, 429 (9<sup>th</sup> Cir., 1975). *Jackson v. Montgomery*  
14 *Ward*, 173 F.R.D. 524, 528-529 (D. Nev., 1997). *Moss v. Blue Cross and Blue*  
15 *Shield of Kansas, Inc.*, 241 F.R.D. 683, 688 (D. Kan., 2007). *Paul Johnson*  
16 *Drywall, Inc. v. Phoenix Insurance Co.*, 2014 WL 1764125 (D. Ariz., 2014).

17 **Plaintiff’s Second Set of Interrogatories**  
18 **(#16 through 23) (April 3, 2015)**

19 16. List the following information for each and every charge or  
20 complaint alleging age discrimination or retaliation in connection with age  
21 discrimination filed against the BOA with either the United States Equal  
22 Employment Opportunity Commission or the Arizona Civil Rights Division or  
23 the New Mexico state agency which receives and investigates charges of  
24 unlawful employment discrimination which were filed or received during the  
25 years of 2008 through 2013. With respect to each charge or complaint  
26 provide (a) the name and last known address and contact information of the

1 complaining party, (b) the agency with which the charge was filed and its case  
 2 number, (c) the date of the charge filing, (d) the final disposition of such  
 3 charge, and (e) whether or not such person is presently employed by BOA.

4 The BOA refused to answer this Interrogatory.

5 Such claims or charges by other BOA employees may be relevant and  
 6 always discoverable. *Sprint/United Management Co. v. Mendelsohn*, 128 S.  
 7 Ct. 1140 (2008). *Obrey v. Johnson*, 400 F. 3d 691 (9<sup>th</sup> Cir., 2005). *Heyne v.*  
 8 *Caruso*, 69 F. 3d 1475 (9<sup>th</sup> Cir., 1993). *Spulak v. K Mart Corp.*, 894 F. 2d  
 9 1150, 1156 (10<sup>th</sup> Cir., 1990). *Moss v. Blue Cross and Blue Shield of Kansas,*  
 10 *Inc.*, 241 F.R.D. 683, 688-692 (D. Kan., 2007). *Jackson v. Montgomery Ward,*  
 11 *173 F.R.D. 524 (D. Nev., 1977).*

12 This right to discover evidence pertaining to other employees' similar  
 13 claims does not depend upon the (later) determination of whether or not it  
 14 may be admissible as relevant. That determination involves a later decision  
 15 by the Court as to its relevancy to a particular case by applying Federal  
 16 Evidence Rules 401 and 403. *Sprint/United Management Co. v.*  
 17 *Mendelsohn*, 552 U.S. 379 (2008).

18  
 19 17. In response to PCS' Interrogatory #3, BOA listed six CMEs who  
 20 were employed by the BOA as a CME under Dwain Moss on September 30,  
 21 2010: Priscilla Gutierrez, Eric Gonzales, John Calo, Denise Farmer, Pamela  
 22 Sullivan, and Dean Bird. With respect to each of these six, excluding PCS:  
 23 (a) Are they currently employed by BOA? If yes, what is their current position  
 24 and at what location? If not currently employed by BOA, when did their  
 25 employment by the BOA end, did the employee resign or retire voluntarily or  
 26

1 was the employee terminated by the BOA, and when did such employment  
2 by the BOA end? (b) What is their current address or last known address and  
3 contact information?

4 The BOA did answer this interrogatory **except** that it failed to provide  
5 contact information (addresses, etc.) which would enable the undersigned to  
6 contact these potential witnesses who were similarly situated to PCS and may  
7 have also been victims of age discrimination by the BOA. See the Plaintiff's  
8 argument regarding Interrogatory #16 *supra*.

9  
10 20. Please answer PCS' Interrogatory #9 with respect to all BOA CMEs  
11 ("CME" was PCS' job title when she was fired) in the area, division, or region  
12 overseen by Walter Elcock (who was PCS' regional supervisor) as of the date  
13 of the end of his employment by BOA, stating the month and year of birth of  
14 each CME, whether they are still employed by BOA, and if not, the date their  
15 employment terminated and whether or not they voluntarily resigned or  
16 retired.

17 The BOA refused to answer this Interrogatory.

18 See PCS' comments re Interrogatories #16 & 17, *supra*.

19  
20 22. If PCS had continued to be employed as a BOA CME through the  
21 end of the year 2011, what BOA stock options would she have received or  
22 had a vested right to, when would she have received such stock options, and  
23 what was the value of such stock options on the date they would have been  
24 given or vested in 2011?

25 The BOA response to this interrogatory stated that it would supplement  
26 and provide this information but it has not done so.

1  
2 23. With respect to BOA employees or former employees Michelle  
3 Lulloff (employee #10486643) and Kristen De La Riviere (employee #  
4 27974291): (a) What is the month and year of birth of such employee? (b) Is  
5 such person still employed by the BOA? If not still employed by the BOA,  
6 when did their employment cease and why? (c) Please provide their current  
7 or last known addresses and contact information.

8 The BOA only partially provided the information requested answer is  
9 incomplete. It failed to provide the months and years of birth of these two  
10 persons (comparators in this age discrimination case), why and how their  
11 employment by the BOA ceased, and their current contact so that the  
12 undersigned Plaintiff's counsel could contact them as potential witnesses.

13 The BOA refused to provide this information arguing that it would  
14 invade the privacy rights of such former BOA employees. This is not a  
15 justification for this refusal of discovery. Except for medical records or health  
16 or disability information and social security numbers (which may be  
17 redacted), personnel files of other employees who may be witnesses or  
18 "comparators" are discoverable and are not privileged or irrelevant. *In re*  
19 *Roman Catholic Archbishop of Portland*, 661 F. 3d 417 (9<sup>th</sup> Cir. 2011). *Garrett*  
20 *v. City and County of San Francisco*, 818 F. 2d 1515, 1519, footnote #6 (9<sup>th</sup>  
21 Cir. 1987). *Guerra v. Board of Trustees*, 567 F. 2d 352 (9<sup>th</sup> Cir. 1977). *Ivy v.*  
22 *Outback Steakhouse, Inc.*, 2006 WL 3813555 (W.D. Wash. 2006). *Hill v.*  
23 *Motel 6*, 205 F.R.D. 490, 495-496 (S.D. Ohio, 2001). *Ragge v.*  
24 *MCA/Universal Studios*, 165 F.R.D. 601 (C.D. Cal. 1995). *EEOC v. County*  
25  
26

1 *of San Benito*, 818 F. Supp. 289 (N.D. Cal. 1993). *Moss v. Blue Cross and*  
 2 *Blue Shield of Kansas, Inc.*, 241 F.R.D. 683, 698 (D. Kan., 2007).

3  
 4 **Plaintiff's Second Request for Production (April 3, 2015)**

5 Renewal of Request No. 1: Copies of all charges of age discrimination  
 6 in employment or retaliation for having complained of or opposed age  
 7 discrimination in employment or retaliation in connection with age  
 8 discrimination filed by any person employed or formerly employed or who  
 9 sought employment against BOA by persons within the BOA Southwest  
 10 Region, including but not limited to Arizona, New Mexico, and Texas, filed or  
 11 presented to either the U.S. Equal Employment Opportunity Commission or  
 12 the Arizona Attorney General Civil Rights Division or the comparable  
 13 employment discrimination enforcement agencies for the states of New  
 14 Mexico or Texas or other states within the BOA Southwest Region since  
 15 January 1, 2008, and any and all responses to such charges made or given  
 16 by or on behalf of BOA.

17 The BOA refused to provide responsive documents.

18 Such claims or charges by other BOA employees may be relevant and  
 19 always discoverable. *Sprint/United Management Co. v. Mendelsohn*, 128 S.  
 20 Ct. 1140 (2008). *Obrey v. Johnson*, 400 F. 3d 691 (9<sup>th</sup> Cir., 2005). *Heyne v.*  
 21 *Caruso*, 69 F. 3d 1475 (9<sup>th</sup> Cir., 1993). *Spulak v. K Mart Corp.*, 894 F. 2d  
 22 1150, 1156 (10<sup>th</sup> Cir., 1990). *Moss v. Blue Cross and Blue Shield of Kansas,*  
 23 *Inc.*, 241 F.R.D. 683, 688-692 (D. Kan., 2007). *Jackson v. Montgomery Ward,*  
 24 173 F.R.D. 524 (D. Nev., 1977).



1 This right to discover evidence pertaining to other employees' similar  
2 claims does not depend upon the (later) determination of whether or not it  
3 may be admissible as relevant. That determination involves a later decision  
4 by the Court as to its relevancy to a particular case by applying Federal  
5 Evidence Rules 401 and 403. *Sprint/United Management Co. v.*  
6 *Mendelsohn*, 552 U.S. 379 (2008).

7  
8 Renewal of Request No. 5: Any job description or statement of job  
9 duties for BOA consumer marketing executives (CMEs) (the last job held by  
10 PCS for BOA) during the years of 2008, 2009, 2010, or 2011, with a notation  
11 as to when such job description was written and implemented.

12 The BOA response to this RFP stated that it would supplement and  
13 provide this documentation but it has not done so.

14  
15 Renewal of Request No. 6: All written or published performance  
16 standards for CMEs that BOA had in effect at any time between January 1,  
17 2010 and November 30, 2010, and any procedures regarding how such  
18 performance standards would be enforced.

19 The BOA response to this RFP stated that it would supplement and  
20 provide this documentation but it has not done so.

21  
22 Renewal of Request No. 7: All performance standards communicated  
23 by BOA, either in writing or electronically, to PCS during the time she was a  
24 CME for BOA, including communications to her concerning whether she was  
25 meeting those standards.

26

1       The BOA alleges that it fired PCS because she had failed to meet  
2       certain performance standards for her position, but it has refused to provide  
3       this requested documentation.

4  
5       Renewal of Request No. 8: All correspondence, either written or  
6       electronic, by Dwain Moss, Walter Elcock, Mary Kanaga, Michael Rogers,  
7       and/or Brad Kimball (all current or former employees of the BOA who knew  
8       PCS) mentioning or concerning PCS during the years of 2009 and 2010.

9       The BOA stated in its Response that it would supplement and provide  
10      this documentation but has not done so. The persons listed were all BOA  
11      executives or persons who may have had input on the decision to terminate  
12      PCS.

13  
14      **Plaintiff's Third Request for Production (April 30, 2015)**

15  
16      Request No. 13: Copies of all EEO-1 Reports filed or created by the  
17      BOA which pertained in whole or in part to its operations and/or branches in  
18      the States of Arizona and/or New Mexico during or for the years of 2008  
19      through and including 2012. EEO-1 reports are defined as those required to  
20      be made, created, or produced by employers pursuant to 29 C.F.R. 1602.7.

21      The BOA refused to provide responsive documents.

22      Paragraph 24 of the Complaint alleges:

23             "24. The BOA has engaged in a pattern and practice of  
24             discrimination against older (forty and older) executive and  
25             management line employees in recent years, and its firing of PCS was  
26             done as part of that pattern and practice."

1 All large employers in the U.S. (such as the BOA) are required by law  
2 (29 C.F.R. 1602.7 et seq.) to file an EEO-1 report each year with the EEOC  
3 to enable that agency to carry out its statutory duties to monitor U.S.  
4 workplaces for evidence of unlawful employment discrimination.

5 Such reports are both discoverable and relevant when an employer is  
6 sued for a violation of a federal employment discrimination statute (age  
7 discrimination in the instant case). *Grant v. News Group Boston, Inc.*, 55 F.  
8 3d 1, 6 (1<sup>st</sup> Cir., 1995). *Thayer v. Sivyer Steel Corp.*, 149 F.R.D. 177 (S.D.,  
9 Iowa, 1993). *Martin v. Potomac Electric Power Co.*, 1990 WL 158787  
10 (D.D.C., 1990). *Witten v. A. H. Smith & Co.*, 100 F.R.D. 446 (D. Md., 1984).  
11  
12

13 Respectfully submitted this 23<sup>rd</sup> day of June, 2015.  
14

15 JERRY S. SMITH, PLLC  
16

17 /s/Jerry S. Smith

18 Jerry S. Smith  
19 Attorney for Plaintiff  
20

21 This Memorandum shall be filed on the date above pursuant to the U.S.  
22 District Court for Arizona Electronic Case Filing Administrative Policies and  
23 Procedures Manual,

24 By: /s/ Jerry S. Smith  
25 Jerry S. Smith  
26